(37)

IN THE SUPREME COURT OF THE UNITED STATES

No. 03-1027

Supreme Court, U.S.
FILED
JAN 16 2004
OFFICE OF THE CLERK

DONALD RUMSFELD, PETITIONER

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION TO EXPEDITE CONSIDERATION OF PETITION FOR CERTIORARI
AND TO ESTABLISH EXPEDITED SCHEDULE FOR BRIEFING
AND ARGUMENT IF CERTIORARI IS GRANTED

In a petition for certiorari filed today, the Solicitor General, on behalf of petitioner Donald Rumsfeld, Secretary of Defense, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The court of appeals' unprecedented decision orders the release of an individual whom the President -- acting as Commander in Chief in a time of war -- has determined should be detained as an enemy combatant. Because of the importance and urgency of the questions presented for review in this case, and because the Court recently granted a petition for certiorari to review the decision of the Fourth Circuit in Hamdi v. Rumsfeld, cert. granted, No. 03-6696 (Jan. 9, 2004), which raises related

issues concerning the authority of the President during wartime to order the detention of American citizens as enemy combatants, petitioner moves for adoption of a schedule and for other procedural actions that will permit the Court to expedite consideration of the petition and briefing and argument on the merits such that oral argument in this case could be heard in the upcoming April session of this Court, when oral argument in the Hamdi case will also be heard.

1. On December 18, 2003, the Second Circuit held that the President of the United States lacks authority to detain as an enemy combatant Jose Padilla, a United States citizen seized within the United States on May 8, 2002. The President ordered Padilla's detention as an enemy combatant based on a determination that Padilla is closely associated with al Qaeda and came to the United States to advance plans for the conduct of further terrorist attacks against the United States. See Pet. App. 57a-58a. The Second Circuit ruled that Padilla's detention is barred by 18 U.S.C. 4001(a). The court reasoned that Section 4001(a) prohibits the detention of American citizens detained by the military as enemy combatants, and that Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), fails to authorize Padilla's detention, because it does not "include[] the authority to detain American citizens seized on American soil and not actively engaged in combat." Pet. App. 51a.

Expedited consideration is warranted because the Second Circuit's decision undermines the constitutional authority of the Commander in Chief to protect the United States against additional enemy attacks launched within the Nation's borders. Those concerns are particularly acute in the current conflict, waged against an enemy that operates in secret and plots surreptitious and large-scale attacks on civilian targets. Expedited consideration is also warranted to permit this Court to consider this case at the same time it considers the related questions of the President's authority to detain American citizens as enemy combatants during wartime presented in the Hamdi case.

2. Counsel for respondents have agreed to expedited consideration of the petition. Under the schedule worked out between the parties, respondents' brief in opposition to certiorari would be filed on February 4, 2004, and petitioner would waive the 10-day period provided for in this Court's Rule 15 between the filing of the brief in opposition and distribution of the petition. That would allow the petition for certiorari and related briefs to be distributed in advance of this Court's scheduled conference on February 20, 2004.

If the Court grants the petition for certiorari, then the parties would propose the following schedule for the Court's consideration: (1) petitioner's opening merits brief to be filed on March 17, 2004; (2) respondents' merits brief to be filed on

April 12, 2004; (3) petitioner's reply brief to be filed on April 21, 2004; and (4) oral argument in this case, as well as oral argument in the Hamdi case, to be heard on April 28, 2004.

3. In light of the need for expedition and the shortness of time, petitioner also moves for leave to file the petition for certiorari in page proofs, with printed copies to follow.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
Counsel of Record

JANUARY 2004